Malicious Legal Transplants

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It is frequently assumed that legal transplants can help law makers in choosing the best ideas from elsewhere in the world. However, this article suggests that there can also be cases of 'malicious legal transplants'. It explains why such transplants emerge and how they may be prevented. This discussion fills a gap in the normative debate about legal transplants: while it is valuable to identify good models, it is equally important to understand how the impact of malicious ideas can be prevented.

'If you dance with the devil, the devil doesn't change.
The devil changes you' (8MM [film] 1999).

INTRODUCTION

It seems plausible to argue that learning from other countries can be valuable. For example, when a country suffers from economic hardship, ethnic tensions or any other problem, why not consider the experience from another country that has managed to overcome this problem? It is therefore frequently suggested that countries can benefit from legal transplants as far as they can identify legal rules that have already been successfully 'tested' abroad.[1]

However, some commentators also take a sceptical view of legal transplants. For example, it may be criticised that legal transplants often do not 'fit' well in the transplant

[1] R Michaels 'Make or Buy – A New Look at Legal Transplants' in H Eidenmüller (ed) *Regulatory Competition in Contract Law and Dispute Resolution* (Munich: Beck 2013) p 34; B Markesinis 'Our Debt to Europe: Past, Present and Future' in B Markesinis (ed) *The Coming Together of the Common Law and the Civil Law* (Oxford: Hart Publishing, 2000) p 61; K Zweigert and H Kötz *An Introduction to Comparative Law* (3rd edn, Oxford: Clarendon 1998) p 17.

country due to differences in the socio-economic context.[2] Other critiques focus on the uneasy relationship between foreign rules and the domestic legal system and identify this as a problem of 'legal irritants' – or even claim that legal transplants are 'impossible'.[3] Sometimes the criticism has also been directed against the substance of the transplanted rules, for example, due to political disagreements with certain positions of foreign law[4] or due to the diffusion of inefficient ideas.[5]

This article introduces another type of legal transplants, namely those that can be seen as 'malicious', for example, transplants that are harmful to the, previously intact, social coexistence of different groups of society.[6] The lack of research dealing with such transplants may be explained by aim of mainstream comparative law to provide policy recommendations and, thus, a bias for legal models perceived as good. However, as this article will explain, there is also a need to study malicious legal transplants, notably in order to understand whether and how it may possible to prevent them.

The structure of the argument is as follows: Section 1 sets the scene of the proposed new topic of malicious legal transplants. It provides examples that illustrate the meaning and scope of this concept. It also outlines the debate about legal transplants and diffusion, given that some of the previous lines of research can be helpful in the understanding of malicious legal transplants. On this basis, Section 2 develops an evaluative framework for malicious legal transplants. It identifies the main determinants for the occurrence of malicious legal transplants, leading to suggestions on how, at least in some circumstances, it may be possible to prevent them. Section 3 concludes with general reflections about the research on legal transplants as it identifies either good models or, indeed, malicious ones.

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[2] A point frequently raised about legal systems in transition: eg, A Donaggio 'Limitations of Legal Transplants and Convergence to Corporate Governance Practices in Emerging Markets: The Brazilian Case' in S Boubaker amd DK Nguyen (eds) *Corporate Governance in Emerging Markets* (Berlin: Springer 2014) pp 465-484; J Jupp 'Legal Transplants as Tools for Post-Conflict Criminal Law Reform: Justification and Evaluation' (2014) 3 *Cambridge Journal of International and Comparative Law* 381.

[3] G Teubner 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11; P Legrand 'The Impossibility of Legal Transplants' (1997) 4 *Maastricht Journal of European and Comparative Law* 111.

[4] See eg the debate in the US: OJ Benvenuto 'Reevaluating the Debate Surrounding the Supreme Court's Use of Foreign Precedent' (2006) 38 *Fordham Law Review* 2596.

[5] E Carolan 'Diffusing Bad Ideas: What the Migration of the Separation of Powers Means for Comparative Constitutionalism and Constitutional Transplants', in S Farran, J Gallen and C Rautenbach (eds) *The Diffusion of Law* (Farnham: Ashgate 2015) pp 213-233.

[6] For details and examples of this category see Section 1 (a), below

1. SETTING THE SCENE: MALICIOUS AND NON-MALICIOUS LEGAL TRANSPLANTS

The notion of 'malicious legal transplants' is a new one, but it can also be related to other types of legal transplants. Thus, this section discusses, first, how this new notion can be understood and, secondly, how it is related to previous research which deals with (mainly) non-malicious forms of legal transplants and policy diffusion.

(a) The notion of 'malicious legal transplants'

This article does not suggest a closed definition of 'malicious legal transplants'. Yet, as a starting point, it is helpful to explain, tentatively, how 'legal transplants' in general and 'malicious legal transplants' in particular may be defined. The subsequent text introduces three examples which will be seen as core cases of 'malicious legal transplants'. Finally, it is contemplated which further cases could be identified.

(i) A tentative definition of '(malicious) legal transplants'

Alan Watson is often seen as the founding father of the concept of legal transplants.[7] Watson's view is shaped by being a legal historian and Roman lawyer, in particular his insight that the private law of many countries is significantly based on the reception of Roman law. Here Watson found that 'borrowing, even mindless, is the name of the legal game'.[8] Such borrowing is not limited to legal rules, since the transplant of Roman law also concerned legal institutions and structures.[9] Thus, according to Watson, it shows that rules and concepts 'can survive without any close connection to any particular people, any particular period of time or any particular place'.[10]

[7] A Watson *Legal Transplants: An Approach to Comparative Law* (2nd edn, Athens: University of Georgia Press 1993); the first edition was from 1971. But see also JW Cairns 'Watson, Walton and the History of Legal Transplants' (2013) 41 *Georgia Journal of International and Comparative Law* 637.

[8] A Watson *Law, Society, Reality* (Lake Mary, FL: Vandeplas 2007), p 5.

[9] A Watson 'The Importance of "Nutshells"' (1994) 42 *American Journal of Comparative Law* 1, 2.

[10] A Watson 'Legal Transplants and Law Reform' (1996) 92 *Law Quarterly Review* 79, 81.

In the contemporary literature on legal transplants it is also said that the object of a legal transplant can be diverse. Often it is the (mere) text of a particular statute law,[11] but recently there have also been extensive discussions about citations to foreign judgments in court decisions.[12] Beyond legal texts, today, the main aim is often to transfer particular ideas or policies, for example, the idea of having codified state law or spreading the idea of the Western model of human rights to other parts of the world.[13] Going further, elements related to a country's legal culture can also be transplanted: though these elements – such as legal education, methods, and mentalities – cannot be changed overnight, most comparative lawyers agree that, here too, foreign models can be used.[14]

In addition, there is diversity as regards the circumstances that can lead to a transplant. In the literature, frequent examples concern the influence of Western laws in colonial times and the copying of modern business laws across the world more recently.[15] This also shows that legal transplants can be of an involuntary or a voluntary nature. Sometimes the process leading to a legal transplant is less deliberate and more fluid whereby a common language and legal culture influence intellectual exchange:[16] thus, here, terms such as 'legal circulation', 'cross-fertilisation', 'diffusion' or 'migration'[17] may be used in order to describe this type of legal transplant.

For 'malicious legal transplants' it follows that they can also concern any legal object and be either of an involuntary or a voluntary nature. In addition, in order to be 'malicious' there needs to be intention to do harm. Thus, 'malicious legal transplants' have an objective element ('harm'), for example, where one group of society imposes its social norms on another one without need (as will be shown in the next section). In addi-

[11] So, this refers to 'legislative comparative law', see Zweigert and Kötz, above n 1, p 51.

[12] See eg M Gelter and M Siems 'Citations to Foreign Courts – Illegitimate and Superfluous, or Unavoidable? Evidence from Europe' (2014) 62 *American Journal of Comparative Law* 35.

[13] See eg J-L Halpérin 'The Concept of Law: A Western Transplant?' (2010) 10 *Theoretical Inquiries in Law* 333; BA Simmons *Mobilizing Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press 2009).

[14] For different forms and objects of legal transplants see eg W Twining *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press 2009) p 279.

[15] Summary in M Siems *Comparative Law* (Cambridge: Cambridge University Press 2014) pp 202-213. See also Section 1 (b) (i), below.

[16] For a specific example: H MacQueen 'Scotland' in Jan M Smits (ed) *Elgar Encyclopaedia of Comparative Law* (2nd edn, Cheltenham: Edward Elgar 2012) p 791.

[17] For the different terms see eg V Perju 'Constitutional Transplants, Borrowing, and Migrations' in M Rosenfeld and A Sajo (eds) *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press 2012) pp 1306-1308.

tion, the subjective element means at least one actor of the transplant process recognises that it can use the transplant in such a manner. Thus, this is different from a situation where a legal transplant merely does not work well due to some kind of unintended consequence. This specific character of 'malicious legal transplants' can also be seen in the following three examples.

(ii) Examples of 'malicious legal transplants'

In many countries of the world multiple ethnicities live peacefully together. But throughout human history there have also been periods of racially-motivated laws with a malicious effect. In some instances, those laws were a product of legal transplants. For example, it has been suggested – but without certainty – that the US racial segregation laws of the 19th century seemed to have influenced the laws of racial identification and purity in Nazi Germany.[18] With more confidence it can be said that the Nazi laws influenced the laws of Mussolini's Italy. There is some scholarly disagreement about the factors accounting for the Italian racial politics under Fascism. Some scholars emphasise internal developments, for example, referring to the impact of rules about the relationship between Italians and the local population in the Italian colonies as well as the fact that Italy had a more cultural (as opposed to purely racial) definition of Jewishness.[19] But scholars often also make reference to the German influence on the Leggi Razziali of 1938:

> 'Italian laws were more or less an imitation of Nazi Germany. In 1937, Mussolini "saw the political usefulness of anti-Semitism, and his views developed rapidly in 1938 as he moved closer to a German alliance". The introduction of a body of legislation against the Jews was 'his own spontaneous decision to show solidarity with Nazism." His cynicism toward a move conceived as "merely tac-

[18] B Ezzell 'Laws of Racial Identification and Racial Purity in Nazi Germany and the United States: Did Jim Crow Write the Laws That Spawned the Holocaust?' (2002) 30 *Southern University Law Review* 1. For further details on the US history see RF Moran, 'Love with a Proper Stranger: What Anti-Miscegenation Laws Can Tell Us about the Meaning of Race, Sex, and Marriage' (2004) 32 *Hofstra Law Review* 1663.

[19] MA Livingston *The Fascists and the Jews of Italy: Mussolini's Race Laws, 1938-1943* (Cambridge: Cambridge University Press 2014); JD Zimmerman (ed) *Jews in Italy under Fascist and Nazi Rule, 1922–1945* (Cambridge: Cambridge University Press 2005); O De Napoli 'The Origin of the Racist Laws under Fascism: A Problem of Historiography' (2012) 17 *Journal of Modern Italian Studies* 106. Those views were also promoted through the Fascist journal *La difesa della razza*.

tical" was unmistakable. Mussolini was not a long-time anti-Semite nor was he an anti-Semite by conviction, but rather was driven by cynical considerations of opportunism: "though he personally thought the idea of racial purity was nonsense, it was politically expedient that others should think differently."'[20]

Another example concerns the spread of religious laws that do not simply codify certain practices for believers, but impose those on members of other religious and non-religious groups. Saudi Arabia, for example, bans non-Muslim places of worship as well as the importation of non-Muslim religious materials and 'haram' food such as pork, all monitored by a religious police force. In recent decades some of those religious laws have spread to other countries – directly or more indirectly through the funding of Wahhabi educational, charitable and religious institutions. The international impact can then be seen, for example, in restrictions to the legal profession to non-Muslims in northern Nigeria[21] and the possible application of a strict Sharia law to non-Muslims in Brunei[22] and in the Indonesian province of Aceh.[23] The Maldives also provides a specific example of such changes:

'(S)ince Islam was introduced in the Maldives in the 12th century, religious practices in the country have been moderate. Yet (…) in 1994, the Protection of Religious Unity Act was passed, which restricted the freedom to practice any other religion besides Islam. In 1996, Gayoom constituted the Supreme Council for Islamic Affairs (which was renamed the Ministry of Islamic Affairs in 2008) charged with overseeing religious affairs in the country. This body of clerics pressured the government to carry out moral and cultural policing of alleged "anti-Islamic activities." In 2008, it asked the police to ban night clubs and discotheques for New Year's Eve celebrations, saying that they were contrary to Islam. In May 2010 (…) new legislation prohibited "talking about religions other

[20] De Napoli, ibid, p 117 (discussion the position of Denis Mack Smith and other historians).

[21] P Marshall (ed) *The Talibanization of Nigeria: Sharia Law and Religious Freedom* (Washington, DC: Freedom House, 2002).

[22] Deutsche Welle, 'Religion Sharia in Brunei: The Sultan's New Laws' (10 May 2014), available at http://www.dw.com/en/sharia-in-brunei-the-sultans-new-laws/a-17627008.

[23] C Chaplin 'Imagining the Land of the Two Holy Mosques: The Social and Doctrinal Importance of Saudi Arabia in Indonesian Salafi Discourse' (2014) 7 *Austrian Journal of South-East Asian Studies* 217; A Kovacs 'Saudi Arabia Exporting Salafi Education and Radicalizing Indonesia's Muslims' (2014) *GIGA Focus*, available at www.giga-hamburg.de/en/system/files/publications/gf_international_1407.pdf.

than Islam in Maldives, and propagating such religions," as well as reinforcing that it is illegal "to use any kind of medium to propagate any religion other than Islam" (….)'.[24]

Those new laws were, to a large extent, the result of foreign influence: from Saudi Arabia, but also through Maldivian students attending madrasas in Pakistan.[25]

The third example is about the criminalisation of homosexual acts through British colonial law. In pre-colonial India – as well as in most other colonies – there may have been social rejection, or perhaps a small fine, but no criminal sanctions for homosexual acts.[26] This changed with section 377 of the Indian Penal Code of 1860, dealing with the 'carnal intercourse against the order of nature' and codifying the British 'buggery law'.[27] This provision was then also adopted by other British colonies, with Malaysia and Singapore adding a further section 377A that also criminalised homosexual acts not covered by section 377. Thus, as a result,

'19th century codifications of British criminal law (…) criminal prohibitions of homosexual acts came into force in all "common law" jurisdictions. The lead role in this process was played by the Indian Penal Code, a one-size-fits-all model code. This occurred in a period in which parallel prohibitions were eliminated in the other major European colonial powers (...)'.[28]

One or both of these provisions have been retained in many of the former British colonies.[29] Since the actual behaviour covered by these provisions can often not be proven, this can be interpreted as a general means to discriminate against homosexuals.[30]

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[24] A Roul 'The Threat from Rising Extremism in the Maldives' (2013) 6/3 *CTC Sentinel* 24-28 (footnotes omitted).

[25] Ibid. See also A Singh Ningthoujam, 'Maldives is No Longer a "Paradise"' (2 April 2015), available at www.ict.org.il/Article/1372/Maldives-is-No-Longer-a-Paradise.

[26] See R Vanita and S Kidwai (eds) *Same-Sex Love in India, Readings in Indian Literature* (New York: Palgrave 2001) p 25.

[27] D Sanders '377 and the Unnatural Afterlife of British Colonialism in Asia' (2009) 4 *Asian Journal of Comparative Law* 1.

[28] Ibid, pp 14-15.

[29] See Human Rights Watch 'This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism' in C Lennox and M Waites (eds) *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalisation and Change* (London: Institute of Commonwealth Studies, 2013) pp 83-123.

[30] Ibid, p 110.

(iii) Common ground and possible extensions

The three examples have in common that the prior position of the transplant country was receptive towards differences in race, religion and sexual orientation. This situation is different from the type of legal transplants, more frequently discussed in the literature, where the traditional culture of the transplant country had been prejudiced towards the behaviour that the transplant aimed to introduce; for example, transplants that aimed to liberalise family law in terms of allowing no fault divorce or introducing same-sex unions.[31]

More specifically, the 'maliciousness' of the legal transplant in the three examples follows from the change of the status quo to a situation where one group of society imposes its social norms on another one without need. While societies require some common rules, it is not justifiable to intervene in religious, sexual and other practices that do not pose any harm to other groups of society.[32] Such transplants are therefore particularly harmful for diverse societies where law needs to facilitate the coexistence of different groups. Thus, in these situations the problem is not simply the underlying idea but the fact that the legal change is designed with malicious intentions in mind.

Since 'malicious legal transplants' are a new concept, it is, however, not suggested that there may not also be other categories of such transplants. A first of those may concern examples where the policy orientation of the imported law is rejected. For instance, it may be argued that, in recent decades, we have observed how a 'neoliberal' Anglo-Saxon business law has, maliciously, spread to social-democratic countries in Europe.[33] Or, it may be argued that it was 'liberal' European ideas, such a system of national health care, that have 'infected' US law.[34] Or, within Europe, perhaps the case law of the European Court of Human Rights has been harmful to the UK legal system in re-

[31] See eg L Friedman 'Some Comments on Cotterrell and Legal Transplants' in D Nelken and J Feest (eds) *Adapting Legal Culture* (Oxford: Hart) pp 93-98, with 'no fault divorce' as an example; MF Moscati *Pasolini's Italian Premonitions: Same-Sex Unions and the Law in Comparative Perspective* (London: Wildy, Simmonds and Hill 2014).

[32] MC Nussbaum '"Equal Respect for Conscience": Roger Williams on the Moral Basis of Civil Peace' (2007) 15 *Harvard Review of Philosophy* 4, 14 (with reference to Locke).

[33] For the debate see eg G Schnyder and M Siems 'The Ordoliberal Variety of Neoliberalism' in S Konzelmann and M Fovargue-Davies (eds) *The Faces of Liberal Capitalism: Banking Systems in Crisis* (London: Routledge 2013) pp 250-268.

[34] Eg, S Gregg *Becoming Europe: Economic Decline, Culture, and How America Can Avoid a European Future* (New York: Encounter Books 2013).

quiring it to provide voting rights to prisoners and in restricting the ability to deport foreign criminals to their home countries.[35]

A second category would be more specific about the effect in the transplant country. In the discourse about the relationship between law and development, it is often argued that the influence of Western legal ideas has been harmful to countries of the developing worlds, for example, because 'Western laws' that protect property rights may be counterproductive when corruption and income disparity mean that these laws are mainly used by the current elites to the detriment of the poor.[36] Such reasoning can also be related to the frequent general view that much of the Western influence in the world has been harmful, characterising it as 'a tale of cross-contamination, the spread of bad ideas'.[37]

But these two further categories can also be seen as problematic since not everyone may regard these transplants as malicious. With respect to differences in policy orientation, there is bound to be disagreement about the value and precise balance of such goals. It is also not always clear whether the lack of a transplant's 'fit' is really something negative since some transplants have the explicit aim to stimulate changes in the society in question.[38] And, more generally, as legal philosophy and jurisprudence discuss various normative theories of justice and injustice,[39] it is clear that there cannot be full agreement about a positive or negative assessment of a particular transplant.

For the purposes of this article, however, this 'fuzziness' is not a problem. It is only necessary that normative positions are possible. Thus, for anyone who does not subscribe to a radical relativist position, there will be situations where particular rules are seen as not only technically flawed but 'malicious' – and there is therefore the need to understand such cases in more detail.

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[35] Eg, M Pinto-Duschinsky *Bringing Rights. Back Home. Making human rights compatible with parliamentary democracy in the UK* (London: Policy Exchange 2011).

[36] Eg, U Mattei and L Nader *Plunder: When the Rule of Law is Illegal* (Oxford: Wiley-Blackwell 2008).

[37] I Buruma and A Margalit *Occidentalism: The West in the Eyes of its Enemies* (New York: Penguin 2004) p 149.

[38] D Nelken 'Comparatists and Transferability', in P Legrand and R Munday (eds) *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press 2003) p 456 ('geared to fitting an imagined future').

[39] See eg MJ Sandel (ed) *Justice: A Reader* (New York: Oxford University Press, 2007); E Heinze *The Concept of Injustice* (Abingdon: Routledge, 2013).

(b) Research context: legal transplants and diffusion of ideas

While the concept of 'malicious legal transplants' is a new one, it can also be related to previous research in law and other disciplines. This second part of this section will therefore outline the positive and the normative research about legal transplants in comparative law as well as the research on the diffusion of ideas and policies, thus setting the scene for the evaluative framework of the subsequent sections.

(i) Positive research in comparative law

The beginning of this article mentioned that legal transplants often aim to use ideas that have been successfully 'tested' abroad. This is indeed a frequently mentioned reason why legal transplants are said to occur.[40] Thus, here, transplants are driven by the transplant country which deliberately adopts a good legal rule (or legal institution) from another country. In addition, it has the benefit that copying a foreign law saves law-makers the costs of drafting an original law on their own.[41]

More subjective are transplants that reflect the internal preferences and interests of the transplant country. For example, as law-makers cannot evaluate the potential benefits of all countries of the world, they will choose a foreign model that the general public perceives to be the most legitimate one. It is also likely that interest groups of the transplant country will shape the choice of the model that is most favourable to them.[42]

With respect to the aspired benefits for the origin country, a country can, for example, benefit from its laws being transplanted, since a familiar legal system makes it easier for its firms to do business with firms from the transplant country (i.e. it reduces transaction costs). If other countries follow the values of the origin countries, the latter benefits from the 'prestige' of having an influential legal system – and this can also have tangible benefits: for instance, foreign lawyers who want to buy literature about this legal system, or pay to study at its universities.[43]

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[40] For the following see Siems, above n 15, pp 191-195 (with further references).

[41] JM Miller 'A Typology of Legal Transplants: Using Sociology, Legal History, and Argentine Examples to Explain the Transplant Process' (2003) 51 *American Journal of Comparative Law* 839 calls those 'cost-saving transplants' (p 845).

[42] Miller ibid, as 'legitimacy-generating' (p 854) and 'entrepreneurial' transplants (p 849).

[43] See eg the recent 'battle of brochures' discussed in H Kötz 'The Jurisdiction of Choice: England and Wales or Germany?' (2010) 18 *European Review of Private Law* 1243.

Another crucial consideration is the power relationship between the two countries. From the perspective of the transplant country, transplants can be ordered by the extent to which it still enjoys de facto sovereignty regarding the transplant decision, distinguishing between imposition, transnational commitment, external pressure, prestige generated, and voluntary adoption.[44] From the perspective of the origin country, the transplant can be a result of soft power or forms of 'legal imposition' or even 'legal imperialism'.[45] These forms of transplants can be related to examples from history, such as the colonial influence of Western powers. As a form of 'neo-imperialism' they are also said to be a common feature of many developments today, for example, through influence of the World Bank's Doing Business Reports on the business laws of transition and developing countries.[46]

All of these latter considerations show that even in the current legal research it is not seen as a matter of course that transplants are simply the result of a search for 'better law'. These considerations will become relevant again when this article turns to the reasons why, sometimes, even malicious legal transplants occur.[47]

(ii) Normative research in comparative law

In the normative research about legal transplants, a helpful division is between supporters and sceptics (while intermediate positions are also widespread).[48] The supporters argue that legal transplants can help countries to address major economic and social problems. Thus, we are told that comparative lawyers should aim to 'increase intellectual interaction and borrowings', denouncing opposition as 'parochialism'.[49] The practicality of transplants is not doubted since most, if not all, legal systems have managed to incorporate ideas from various parts of the world: in other words, 'no legal system is

[44] M Cohn 'Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom' (2010) 58 *American Journal of Comparative Law* 583, 591 (in addition referring to negative fertilisation and novation).

[45] See eg U Mattei 'A Theory of Imperial Law: A Study of U.S. Hegemony and the Latin Resistance' (2003) 10 *Indiana Journal of Global Legal Studies* 383.

[46] For examples see Siems, above n 15, pp 183-186, 207-211, 277-299.

[47] Section 2 (a), below.

[48] For the intermediate position see Siems, above n 15, pp 197-200.

[49] Markesinis, above n 1, p 49; E Buscaglia and W Ratli *Law and Economics in Developing Countries* (Stanford, CA: Hoover Institution, 2000) p 31.

entirely a prisoner of its own past traditions'.[50] Such a position is also supported by economists and development organisations as they often regard it as crucial to implement successful legal models from other countries in order to stimulate a country's development.[51]

The sceptics object that, in practice, legal transplants are often unfavourable to the incoming legal system. Two variants of such a view can be distinguished. On the one hand, the criticism can refer to the relationship between the transplanted and the previous law. Thus, it may be argued that foreign ideas have 'polluting or disrupting effects' on the domestic legal order[52] and that, therefore, legal transplants should really be called 'legal irritants'.[53] On the other hand, the negative effect may refer to the relationship between the transplanted law and the social, economic, cultural and political environment. Taking the view that there are complementarities between the law, society, culture, and political process of each country,[54] it follows that one should not simply copy laws from abroad. Thus, according to this view, legal transplants often fail, for instance, due to lack of enforcement, side-lining, or general unsuitability.[55]

Sometimes the criticism is also directed against the more general idea of the transplanted law, thus shifting the criticism closer to the notion of transplants that some may regards as 'malicious'. A prominent example concerns human rights. According to 'cultural relativists', the Western origins of human rights mean that they should not be imposed on other cultures.[56] For example, it is argued, that formal legal rights may not be appropriate for societies in Africa and the Middle East, which are based on kinship and other group-centred social structures, and where law and religion are not strictly sepa-

[50] TT Arvind 'The 'Transplant Effect' in Harmonization' (2010) 59 *International and Comparative Law Quarterly* 65, 81.

[51] For a summary see MJ Trebilcock and MM Prado *Advanced Introduction to Law and Development* (Cheltenham: Edward Elgar 2014) pp 45-55.

[52] HC Gutteridge *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (Cambridge: Cambridge University Press 1946) p 25.

[53] Teubner, above n 3.

[54] See eg B Ahlering and S Deakin 'Labour Regulation, Corporate Governance and Legal Origin: A Case of Institutional Complementarity? (2007) 41 *Law & Society Review* 865.

[55] NHD Foster, 'Comparative Commercial Law: Rules or Context?' in E Örücü and D Nelken (eds) *Comparative Law: A Handbook* (Oxford, Hart Publishing, 2007) pp 273-274. See also D Berkowitz, K Pistor and J-F Richard 'The Transplant Effect' (2003) 51 *American Journal of Comparative Law* 163.

[56] For a summary of the discussion see P Alston and R Goodman *International Human Rights* (Oxford: Oxford University Press 2012) pp 531-557.

rated. It has also been said that 'Asian values' may be irreconcilable with human rights, for instance, referring to the collectivist and communitarian principles in Asian culture.

(iii) Research on diffusion of ideas and policies

At a general level, the legal-transplant literature can be related to research dealing with the evolution of ideas and other cultural 'units'. Such research can be of a historical nature,[57] but the growing field of 'futures studies' also explores possible development trends in the coming decades and centuries.[58] Theories of 'cultural selection' often pursue a more theoretical angle, using evolutionary concepts.[59] Related to such research is also the theory of 'memetics' which analyses how far units of culture ('memes') evolve similar to Darwinian principles.[60]

More specifically, legal transplants can be linked to research on the diffusion of innovations. A book by Everett Rogers is often cited as the work that most clearly explains what accounts for the adoption of an innovative idea or technology. According to Rogers, an innovation succeeds if it (i) has a relative advantage over existing ideas or technologies, (ii) is compatible with the adopter's preconditions, (iii) has a low level of complexity, (iv) allows a system of trial and error, and (v) has observable benefits.[61] But it is also clear that these five factors are not the only possible determinants for the adoption and implementation of particular innovations. For example, for complex phenomena, it can be important to break down innovations into manageable parts and adopt them in an incremental basis.[62]

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[57] The main journal is the *Journal of the History of Ideas*.

[58] See eg the main associations: the World Future Society (www.wfs.org), the World Futures Studies Organisation (www.wfsf.org), and the Association of Professional Futurists (www.profuturists.org).

[59] GKD Crozier 'Reconsidering Cultural Selection Theory' (2008) 59 *British Journal for the Philosophy of Science* 455.

[60] R Dawkins *The Selfish Gene* (2nd edn, Oxford: Oxford University Press 1989). For an application to law see S Deakin 'Evolution for Our Time: A Theory of Legal Memetics' (2002) 55 *Current Legal Problems* 1.

[61] E Rogers *Diffusion of Innovations* (5th ed, New York: Free Press, 2003).

[62] See T Greenhalgh and others *How to Spread Good Ideas - A systematic review of the literature on diffusion, dissemination and sustainability of innovations in health service delivery and organisation* (Report for the National Co-ordinating Centre for NHS Service Delivery and Organisation R&D, April 2004) pp 15, 142. See also W Twining 'Social Science and Diffusion of Law' (2005) 32 *Journal of Law and Society* 203, 217-220 (sceptical about the suitability of Rogers' diffusion theory).

In the political science literature, a similar discussion concerns the conditions for the transferability of policies. It is said that the countries involved need to be ideologically and psychologically compatible. Thus, there needs to be agreement on basic policy objectives and values (for example, whether and how social welfare is provided) and to consider that resistance against a policy can arise both at the level of the government and of the general public.[63] Political science has also been interested in different mechanisms for policy transfers: the main emphasis has been on processes of learning and mimicking but it has also analysed coercive and competitive mechanisms.[64]

These lines of research have their main interest in the diffusion of 'good' ideas (including good technologies and policies). By contrast, a book by the late French sociologist Raymond Boudon has, in translation, the title 'ideology: the origin and diffusion of mistaken ideas'.[65] Boudon takes the position that these mistaken ideas are not due the irrationality of the actors but, rather, that rational actors follow these ideas as 'black boxes' due to reasons of 'social position, cultural disposition, and historical situation'.[66] For his main examples Boudon refers to mainstream theories of economic development but also the dependency theory. Similar is a book by the heterodox economists John Quiggin on 'zombie economics'. Quiggin argues that many 'dead economic ideas still walk among us', for example, referring to the notion about the efficiency of capital markets after the global financial crisis of 2008.[67]

A problem with these two books may be that readers who do not share Boudon's and Quiggin's criticism of these theories may well find that their core cases are not actually negative ones. However, it is also possible to present clearer 'malicious' examples, some of them related to the legal examples of the previous section. While an example from a history review discusses the 'spread of intolerance, absolutism, and racism in early modern Europe',[68] the main cases derive from the 20th and early 21st century. For

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[63] For a summary see L Hantrais *International Comparative Research: theory, methods and practice* (Basingstoke: Palgrave 2009) pp 133-139.

[64] JL Campbell 'Institutional Reproduction and Change' in G Morgan and others (eds) *The Oxford Handbook of Comparative Institutional Analysis* (Oxford: Oxford University Press 2010) pp 97-106.

[65] R Boudon *L'idéologie ou L'origine des idées reçues* (Paris: Fayard 1986).

[66] As phrased in the review by J Herf (1989) 18 *Contemporary Sociology* 291.

[67] J Quiggin *Zombie Economics: How Dead Ideas Still Walk among Us* (Princeton, NJ: Princeton University Press, 2010).

[68] GV Scammell 'Essay and Reflection: On the Discovery of the Americas and the Spread of Intolerance, Absolutism, and Racism in Early Modern Europe' (1991) 13 *The International History Review* 502.

instance, reference can be made to publications that deal with similarities between Nazism and Stalinism,[69] the spread of the demonisation of China in Western media,[70] the spread of the 'genocide ideology' in Rwanda and neighbouring African countries,[71] as well as the spread of 'Al-Qaedaism' and 'Islamic fascism'.[72] This latter example can also be related to another general field of discussion, namely whether the internet, notably social networks such as Twitter, are really beneficial – in the sense of the 'wisdom of crowds'[73] – or whether it is rather the case that they strengthen previously isolated extremist positions.[74]

2. EVALUATIVE FRAMEWORK FOR MALICIOUS LEGAL TRANSPLANTS

On the basis of the considerations of the previous section, it is now possible to develop a conceptual framework for malicious legal transplants. For this purpose, the following will distinguish between the object of the transplant, the transplant process and the dynamics in the transplant country in such scenarios. As Table 1 illustrates, these topics are then applied to the questions about the determinants for the occurrence of malicious legal transplants in the first subsection, and to the means with which malicious legal transplants may be prevented in the second one.

[69] TD Snyder *Bloodlands: Europe Between Hitler and Stalin* (New York: Basic Books 2010).

[70] R Mayer *Serial Fu Manchu: The Chinese Supervillain and the Spread of Yellow Peril Ideology* (Philadelphia: Temple University Press 2013).

[71] F Rusagara 'The Spread of "Genocide Ideology" within the Great Lakes Region: Challenges for Rwanda' in M Campioni and P Noack (eds) *Rwanda Fast Forward* (New York: Palgrave Macmillan 2012) pp 213-227.

[72] K Ramakrishna 'Democratisation of Hate: The Spread of Al-Qaedaism', RSIS Commentaries 2014 No 17, available at www.rsis.edu.sg/wp-content/uploads/2014/07/CO04017.pdf; R Schulze 'Islamofascism: Four Avenues to the Use of an Epithet' (2012) 52 *Die Welt des Islams* 290.

[73] J Surowiecki *The Wisdom of Crowds* (New York: Doubleday 2004).

[74] Cf O Khazan 'The Stupidity of the Crowd' (29 July 2013), available at www.theatlantic.com/health/archive/2013/07/the-stupidity-of-the-crowd/278188/.

Table 1: Conceptual framework and overview of main topics

	Determinants for the occurrence of malicious legal transplants (a below)	*How malicious legal transplants may be prevented (b below)*
(i) The object of the transplant	Attractiveness of transplant in form and substance	Stopping or influencing underlying ideas
(ii) The transplant process	Deficient law making process and influence of private parties	Challenging ideas and power imbalances
(iii) The dynamics in the transplant country	Anti path dependency and power dynamics	Improving resilience of legal system

(a) Determinants for the occurrence of malicious legal transplants

As we have seen, the object of a legal transplant can be legal rules, legal ideas or other elements of the legal system.[75] Thus, the starting point for the following discussion is whether particular objects of transplants are more likely to be of a malicious nature. The subsequent discussion of the transplant process is related to the previous analysis why legal transplants occur.[76] Finally, we consider the dynamics in the transplant country as it was shown that the relationship between groups of society was often an important element in previous examples of malicious legal transplants.[77]

(i) The object of the transplant

The object of the transplant can matter due to its form or its substance. Starting with the formal characteristics, the malicious legal transplant can be due to its combination of cultural and social factors. For example, in the scenarios of rules that stipulate racial

[75] See Section 1 (a) (i), above.
[76] See Section 1 (b) (i), above.
[77] See Section 1 (a) (ii), above.

discrimination[78] the precise legal text is less important than the spread of the underlying ideology. The occurrence of the legal transplant is therefore due to the success of this more general idea which, for example, can derive from the aim of one group of society to impose its moral and ethical standards on the society as a whole.

It can, however, also be the case that the malicious legal transplant is due to the precise legal codification. This form of such a legal transplant can occur where something which, originally, was a mere cultural norm has been codified by the origin country as a generally applicable law. For example, this can happen when a religious practice becomes a legal rule which applies to the entire population including minority groups. Or, it can concern the regulation of particular consensual sexual acts which, originally, were merely seen as inappropriate.[79] Subsequently, the codified rule can then easily be copied by other countries.

The substance of the transplant can also play a decisive role. Here too the reasons that account for the maliciousness of the transplanted legal idea can be the same ones that contribute to its occurrence. In particular, this can happen where the attractiveness of the idea is due to its detachment from reality. Such a case may be described as a situation where an idea 'seems too good to be true' – and indeed it is. For example, one may think about the Nazi/Fascist belief that racial characteristics are correlated with the virtue and character of human beings, or the view that sexual preferences are entirely a matter of choice.[80]

Another attractive (as regards the transplantation) and malicious substantive factor can be the radical nature of the transplanted law. For example, the appeal of Wahhabi-based legal concepts in Indonesia may be explained by the way 'actors use Saudi Arabia to construct an imaginary ideal through which social and religious issues are contemplated and compared to apparent Indonesian "social corruption"'.[81] This occurrence can also be due to the fact that, following insight from diffusion research, simple ideas spread more easily than complex ones.[82] Here, thus, both the simplicity and the radical-

[78] See the first example of Section 1 (a) (ii), above.

[79] See the second and third examples in Section 1 (a) (ii), above.

[80] See the first and third examples in Section 1 (a) (ii), above.

[81] Chaplin, above n 23, p 217

[82] See Section 1 (b) (iii), above.

ism are attractive features for law makers since they enable them to brand all critics of the transplant as 'heretics'.

(ii) The transplant process

Turning to the relationship between origin and transplant countries, the negative outcome of malicious legal transplants appears to be counterintuitive: following the main narrative about the benefits of regulatory competition, one would usually expect that 'the best' laws survive.[83] Such a positive outcome would also be in line with the view of a 'Darwinian' battle in a marketplace for good ideas.[84]

In this general debate there is, however, also the view that regulatory competition can lead to a 'race to the bottom'.[85] This can also be relevant for legal transplants since – as in law making more generally[86] – mistakes can happen in the transplantation of ideas.[87] For example, it is possible that the cost-saving advantage of a transplant[88] leads to a hasty adoption of a mistaken foreign model. It can also be the case that the law maker of the transplant country misjudges the character of the law since it follows the general belief that the laws from the origin country – say, a country of the same legal family with a distinguished legal tradition – are worth adopting.[89]

More specifically, however, malicious transplantation are, at least from the perspective of one of the participants, the result of a deliberate process.[90] Here, as the general research on legal transplants has observed, the power relationship between the origin and the transplant countries plays an important role.[91] More specifically, the adoption of the foreign idea can have the aim to create or foster an international alliance with the

[83] For the debate see eg DC Esty and D Géradin (eds) *Regulatory Competition and Economic Integration* (Oxford: Oxford University Press 2003).

[84] See Section 1 (b) (iii), above. For the notion of a 'marketplace of ideas' and its shortcomings see also S Poole *Rethink: the Surprising History of Ideas* (New York: Random House 2016).

[85] This phrase was coined by WJ Cary 'Federalism and Corporate Law: Reflections Upon Delaware' (1973-1974) 83 *Yale Law Journal* 663.

[86] See eg R Baldwin, M Cave and M Lodge *Understanding Regulation* (2nd edn, Oxford: Oxford University Press 2012) pp 68-82, on regulatory failures.

[87] Suggested by Carolan, above n 5.

[88] See Section 1 (b) (i), above.

[89] Ibid. (countries often choosing the 'most legitimate model').

[90] See Section 1 (a) (i), above.

[91] Ibid.

origin country.[92] There can also be financial incentives, for example, where the transplant country agrees to follow certain rules of the origin country in exchange for foreign aid supporting its education, health care etc.[93]

In addition, private interests often play a crucial role.[94] Self-interested and strategic law makers may deliberately make use of malicious rules. Such legal rules may also be supported by powerful self-interested transnational groups, such as multi-national corporations, religious organisations and political movements. Moreover, it can be a determinant that powerful private groups from the origin country successfully lobby for their position in the transplant country,[95] for example, aiming to reduce transaction costs or to establish cultural hegemony,[96] depending on the preferences of the group in question.

(iii) The dynamics in the transplant country

Understanding the dynamic within the transplant country is crucial since, conventionally, one would assume that law is path-dependent: thus, in the present scenario, the expectation would be that countries retain their existing law and do not adopt ideas from abroad – and even less so if those are of a malicious nature.

However, there can be forces that overcome such path-dependencies. It is often said that law makers may have a 'pro-innovation bias', namely that 'anything new' is perceived as 'better than what has gone before and that adoption is more worthy of study than non-adoption or rejection'.[97] A more specific rationale for malicious legal transplants can be that adopting those is in line with a general legal trend. For example, it may be argued that the adoption of conservative Islamic laws in countries in Africa and Asia is a continuation of the struggle to fully 'decolonise' from Western ideas.

It is, however, not only the force of such imagined views of modernity or identity that plays a role within the transplant country. It can also be the case that even rational

[92] See the first example in Section 1 a (ii), above.

[93] See the second example in Section 1 a (ii), above.

[94] For private interest theories of regulation see eg B Morgan and K Yeung *An Introduction to Law and Regulation* (Cambridge: Cambridge University Press 2007) pp 43-53.

[95] For both see the second example in Section 1 (a) (ii), above.

[96] See Section 1 (b) (i), above.

[97] Greenhalgh et al, above n 62, p 10.

actors accept dubious ideas.[98] In the current context, such a situation can often arise when the interests of private parties are a decisive factor for the adoption of the malicious legal transplant. For example, a particular legal idea may be supported by powerful private groups (businesses, political parties, religious organisations etc) of the transplant country who use the foreign ideas in a strategic way in order to successfully lobby for their position.

In addition, reasons of political economy often play a crucial role. In the power dynamics within the transplant country the foreign idea can be a useful rhetorical tool to support a particular line of reasoning. A frequent scenario, as evidenced by the examples,[99] is that a majority group uses such an argument for the oppression of a country's minorities. Such a situation may be most likely in illiberal democracies since the majority does not face corresponding accountability of its power. But there can be other situations too. For example, in non-democratic societies the adoption of the foreign idea may have the aim to use such ideas to suppress political opponents.[100] It can also be the case that in a liberal democracy certain electoral rules contribute to a malicious legal transplant: for example, assume a situation where in a country with a first-past-the-post system a party wins the elections without having won the support of the majority of the population. Subsequently this party uses its power to entrench its position by way of disenfranchising parts of the population, say, through rules of racial segregation. Malicious legal transplants are therefore possible in any political system.

(b) How malicious legal transplants can be prevented

Before addressing the question how malicious legal transplants can be prevented, it is important to consider which entities and persons may, in principle, be able to do so. The challenge is that, depending on the type of transplant,[101] the state powers of both the origin and the transplant country may be the perpetrators in question. However, this section will suggest that prevention is, at least in some circumstances, possibly by three broad groups. First, third countries and international organisations can try to exert influ-

[98] Boudon, above n 65.

[99] See all three examples in Section 1 a (ii), above.

[100] Possibly this was the case in the first example in Section 1 a (ii), above.

[101] See Section 1 a (i) and (b) (i), above.

ence on the origin and transplant countries. Second, within the origin and transplant countries societal forces can play a role: thus, citizens, companies and interests groups can try to prevent malicious legal transplants. Third, the current law makers of the origin and transplant countries can try to influence the decisions of future law makers, for example, directly through constitutional rules or indirect through changes of societal conditions. The following will elaborate on these means of prevention, based on the structure of the previous sub-section, thus dealing with the object of the transplant, the transplant process and the dynamics in the transplant country.

(i) The object of the transplant

The most direct way to prevent a malicious legal transplant would be to stop it at its origins. In principle, it may be possible to pursue such a strategy; however, as will be shown, it can also be problematic or ineffective.

In some cases, third countries and international organisations may want to intervene in the origin country. For example, the situation indicated in the first example[102] ended with the defeat of Nazism and Fascism in the Second World War. Of course, it did not eliminate racist ideas – and military campaigns would not be feasible for each spread of a malicious idea. Economic sanctions are another means at the international level. A law-based strategy that some third countries can pursue is to have laws with extraterritorial effects in order to hinder the flow of certain ideas. For example, a country where particular social media companies (Twitter, Facebook etc) are located can regulate their standards with effect to other countries.[103]

The inherent problem is that, while in extreme cases, international or third-country intervention may be justified, in principle, the national sovereignty of the origin country needs to be respected.[104] Practically, it may also be said that any such measure cannot

[102] See Section 1 a (ii), above.

[103] For the discussion see eg JM Moringiello and WL Reynolds 'The New Territorialism in the Not-So-New Frontier of Cyberspace' (2014) 99 *Cornell Law Review* 1415; Symposium issue on Extraterritoriality and EU Data Protection *International Data Privacy Law* (2015) 5(4).

[104] This is a frequent objection against laws with an extraterritorial effect; see eg J Kirshner 'Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritoriality, Sovereignty, and the Alien Tort Statute' (2012) 29 *Berkeley Journal of International Law* 259.

fully eliminate malicious legal transplants: indeed, malicious ideas do not seem to die but are frequently re-born, as the history of racist ideas exemplifies.[105]

Related possibilities and problems are likely for activities by the other two groups that can react to the object of a malicious legal transplant. The societies of the origin and transplant country can try to oppose the idea. In addition, following from the determinants of occurrence identified in the previous section,[106] it is not only the idea that matters but also its codification, abstraction and radicalisation which citizens, interest groups and other constituencies of society can oppose. The problem is that the scenarios discussed here are about situations where the law makers of the countries support the idea. So in liberal democracies the precise boundaries of legitimate powers of minority groups need to be identified,[107] while in other regimes the main question is whether effective political campaigns against the wishes of the government are possible at all.[108]

Current law makers trying to prevent malicious decisions of future law makers can directly address the idea in question. For example, law makers in some countries criminalise certain opinions, symbols and publications, say, in order to prevent the (re-) emergence of racist ideas.[109] A more indirect strategy can, for instance, concern changes to the national school curriculum or other questions of school and university education. But here too the ideas may continue to exist underground. Moreover, at least in liberal societies, it would usually be expected that law makers are accountable to society and do not try to shape society's views according to their preferences.

Overall, this shows the limited means of fully stopping a particular malicious idea. More promising are ways to influence ideas and how they evolve into a possible object of a malicious legal transplant, though this too is certainly not an easy endeavour. It also goes beyond the scope of what legal scholars usually consider in their research as it requires an understanding of the cultural and societal determinants and dynamics underlying malicious ideas.

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[105] See GM Fredrickson *Racism: A Short History* (Princeton, NJ: Princeton University Press 2002).

[106] See Section 2 (a) (i), above.

[107] Eg, in terms of free speech or the right to public protest; see eg D Mead *The New Law of Peaceful Protest* (Oxford: Hart Publishing 2010).

[108] See eg L Chua 'Pragmatic Resistance, Law, and Social Movements in Authoritarian States: The Case of Gay Collective Action in Singapore' (2012) 46 *Law & Society Review* 713.

[109] See eg MJ Bazyler 'Holocaust Denial Laws and Other Legislation Criminalizing Promotion of Nazism' *GPN Genocide Year in Review 2009*, available at www.ihgjlm.com/wp-content/uploads/2016/01/Holocaust-Denial-Laws.pdf.

(ii) The transplant process

A common feature of interventions in the transplant process is that it challenges the success of the malicious ideas. This approach, therefore, follows the spirit that 'little can be borrowed, but much can be learned, from foreign law'[110] – and that indeed 'even apparently vicious and disingenuous ideas can lead to illuminating rebuttal'[111] and that foreign ideas too may be used to show what should *not* be done.[112] Of course, sometimes a transplant already occurred in the distant pasts, for example, the colonial transplants,[113] but even here such information can be useful as it can lead to the reversal of a particular foreign and 'malicious' legal idea.

More specifically, for third countries and international organisations the main approach may be to present benevolent counter-models that weaken the malicious idea. In such a 'battle of ideas', therefore, 'applied comparative law'[114] becomes relevant. In line with a modern contextual understanding of comparative law it is important to consider how far the contextual differences across countries influence the suitability or unsuitability of foreign ideas.[115] Such considerations also play a crucial role for the way international organisations such as the UN and the World Bank influence the choice of legal rules at a global scale.[116]

Another problem to consider is the frequent power imbalance between the origin and the transplant country.[117] Thus, politically and/or economically, the transplant country may feel that it has no choice but to follow the stronger origin country. Here, then, third countries and international organisations can try to prevent, or reverse, malicious legal transplants by way of directly challenging the views of the origin country or providing

[110] E Rubin, 'Administrative Law and the Complexity of Culture' in A Seidman, R Seidman and J Payne (eds) *Legislative Drafting for Market Reform: Some Lessons from China* (Hampshire: Macmillan 2000) p 108.

[111] S Poole, 'Why bad ideas refuse to die', The Guardian, 28 June 2016, available www.theguardian.com/science/2016/jun/28/why-bad-ideas-refuse-die.

[112] Called 'negative fertilisation' by Cohn, above n 44.

[113] See the third example in Section 1 a (ii), above.

[114] See Siems, above n 15, pp 22-23, 192-193.

[115] See above n 2.

[116] See eg Trebilcock and Mota, above n 51, pp 7-12, 78-80 and Section 1 (b) (i), above.

[117] See the second example in Section 1 a (ii), above, as well as 1 (b) (i) and 2 (a) (ii), above.

support to the weaker transplant country so that it becomes easier to withhold the pressure of the origin country.

With respect to societal forces, it depends on the country in question to what extent society can influence the transplant process. It was already mentioned that businesses, lobby groups, and religious organisations can be a driving force behind malicious legal transplants.[118] Thus, such groups may, in some cases, also be able to channel the content and form of the transplant in a positive direction.

How far current law makers should prospectively provide guidance on choices of foreign models has recently become relevant in the US. The state of Oklahoma attracted considerable attention by explicitly prohibiting state courts from considering 'the legal precepts of other nations or cultures' specifically mentioning international law and Sharia Law; other states have passed or are debating measures with similar intentions.[119] The apparent threat is that such a generic position in the search for good legal ideas is based on prejudiced views about certain foreign laws. Thus, it is suggested that for judicial comparative law it is preferable to provide judges with the training and tools in order to enable them to make an informed choice of solutions adopted by courts elsewhere in the world.[120] Likewise, for legislators, the appropriate guidance is that law makers should conduct wide consultations on diverse foreign models in order to make the right choices.

As a result, it can be seen that there are some means to intervene in the transplant process: third countries and international organisation can challenge malicious ideas and power imbalances, and societal groups of the transplant country (including legal scholars) can try to shape the political debate. Details on their success depend on the power relationship between the relevant organisations, states and groups – akin to other re-

[118] See Section 2 (a) (ii), above.

[119] For the debate see eg S Islam 'The Negative Effects of Ill-Advised Legislation: The Curious Case of the Evolution of Anti-Sharia Law Legislation into Anti-Foreign Law Legislation and the Impact on the CISG' (2013/14) 57 *Howard Law Journal* 979; PM Venetis 'The Unconstitutionality of Oklahoma's SQ 755 and Other Provisions Like it that Bar State Courts from Considering International Law' (2011) 59 *Cleveland State Law Review* 189.

[120] E Mak *Judicial Decision-Making in a Globalised World* (Oxford: Hart Publishing 2013). See also Gelter and Siems, above n 12.

search about the relationship between law and politics, for example, on the possible influence of 'subaltern' forces in the age of globalisation.[121]

(iii) The dynamics in the transplant country

Since the transplant country often tends to be politically or economically weak in comparison to other countries, it seems possible for third countries or international organisations to attempt to influence the transplant country's choice of models. As noted in the previous sections, reasons of national sovereignty may provide a counter-argument, but it can also be said that 'meddling' in the transplant country's affairs is justifiable as far as the aim is to prevent a malicious transplant from another country. For example, if Saudi influence pressurises countries to introduce rules that discriminate against non-Muslims,[122] third countries can try to diffuse this pressure, for example, through bargaining about investment treaties or foreign aid.

One may also hope that the society of the transplant country would have a strong voice preventing malicious legal transplants:

> 'Free speech has tools to manage the flow of ideas. Ideally you want to encourage the spread of good ideas and discourage the spread of bad ones. Free societies rely on their ability to isolate, ostracize, boycott, ignore, not read, not pass on, social exclusion, and marginalization to prohibit the spread of bad ideas.'[123]

This suggestion assumes an active position of citizens in the way ideas – including legal ones – are chosen. Moreover, it is premised on the condition that free speech is sufficiently protected in the society in question. It is therefore likely that liberal democracies are less often subject to the malicious legal transplant than other political systems.

More generally, a number of further observations can be made for the way the current law maker of the transplant country can influence the dynamics of the transplant country in the future. Law makers may provide special protection of particular values,

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[121] For the latter see eg B de Sousa Santos and CA Rodriguez-Garavito 'Law, Politics, and the Subaltern in Counter-Hegemonic Globalization' in B de Sousa Santos and CA Rodriguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press 2005), pp. 1-26.

[122] See the second example of Section 1 a (ii), above.

[123] Blog Post 'Should we create a Critical Idea Permeability Index?' (10 July 2013), available at www.thenakedscientists.com/forum/index.php?topic=48240.0.

thereby restricting future law makers. For example, in many countries, the constitutional protection of human rights means that these rules can only be amended by future law makers through special procedures. In addition, some countries' constitutions contain 'eternity provisions' so that certain rules cannot be changed at all. Consider, for instance, that the German constitution protects human dignity in such a way, based on the explicit rationale to prevent a repeat of the Nazi atrocities.[124]

It also makes a difference how the law maker of the transplant country shapes the structure of its political system. Apart from complete shifts in political models, changes in detail matter too. The main examples of malicious legal transplants were about situations where law makers sided against particular groups of society.[125] Thus, it is vital not simply to provide majoritarian representation but rules that protect all members of society. Depending on the society in question, this may, for example, mean strong minority rights, mandatory participation of all groups in the government, a federal structure or other multi-level participation rights.[126]

Consequently, it is not the case that the transplant country is necessarily helpless as regards the risks of malicious legal transplants. The main lesson is that it is possible to improve the resilience of the legal and political system. Of course, having a sound constitutional structure is not merely relevant in order to prevent malicious legal transplants; thus, it also shows that the debate about such design choices needs to balance these and other policy considerations.

[124] Article 1(1), 79(3) of the German Basic Law. For examples from other countries see JI Colón-Riós *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (London Routledge, 2012) p 67.

[125] See Section 1 (a) (ii), above.

[126] See eg M Mutua 'The Iraq Paradox: Minority and Group Rights in a Viable Constitution' (2006) 54 *Buffalo Law Review* 927. See also the discussion in regulation studies: eg, Baldwin et al, above n 86, pp 338-355, 373-387; Morgan and Yeung, above n 94, pp 221-280.

3. CONCLUSION

Recent research on legal transplants has often been concerned with the undertaking to choose and design legal transplants in an intelligent way.[127] This research has a positive dimension as far as it tries to identify how, technically, certain foreign rules can most effectively be transplanted. However, it often also has a normative one as it tries to promote transplants that work well and should therefore be suggested to law makers.

By contrast, the current article started with a normative issue – the idea that legal transplants can be malicious – while it also had a positive dimension – exploring why these transplants occur. In its main parts it suggested three paradigmatic examples of such a transplant, discussed its research context, identified reasons for its occurrence and presented ways in which such transplants can be prevented. Of course, there is no 'silver bullet' against malicious ideas and laws. Rather, any solution has to identify precisely at which stage and with which tools intervention in the determinants of the malicious legal transplant is possible, for example, whether it is feasible to challenge the underlying idea, to counter-act the pressure by the origin country or the influence the power dynamics within the transplant country.[128]

These suggestions to prevent legal transplants may sound out-of-date if we assume that the legal world moves into the direction of a global convergence of legal systems.[129] However, it was not the intention of this article to suggest that laws should never converge – as indeed it did not aim to suggest that legal transplants cannot also be a tool for 'better law'.[130] As a recent book by the economic historian Deirdre McCloskey explains, good ideas have been a major determinant for prosperity around the world.[131] Good ideas can also be foreign ideas. There is no reason to believe that societies benefit from intellectual isolation. Rather, it can be shown that foreign legal ideas may even be

[127] See eg G Frankenberg 'Constitutional Transfer: The IKEA Theory Revisited' (2012) 8 *International Journal of Constitutional Law* 563; H Xanthaki 'Legal Transplants in Legislation: Defusing the Trap' (2008) 57 *International and Comparative Law Quarterly* 659.

[128] See Section 2 (b), above.

[129] For the discussion see Siems, above n 15, pp 222-259.

[130] However this may be defined. See M Siems, 'Bringing in Foreign Ideas: The Quest for "Better Law" in Implicit Comparative Law' (2014) 9 *Journal of Comparative Law* 119.

[131] DN McCloskey *Bourgeois Equality: Ideas, not Capital or Institutions, Enriched the World* (Chicago: University of Chicago Press 2016).

'overfitting' in the sense that they work better in the transplant country than in the country of origin.[132]

As a consequence, the choice and design of legal transplants is indeed crucial. This requires knowledge and understanding of both the technical aspects of the transplant and its normative implications. It also means that scholars of legal transplants need to consider various fields of research such as comparative law, jurisprudence, law and regulation and law & development, as has been attempted in this article. It is suggested that this makes such research a demanding but also a stimulating endeavour.

[132] M Siems 'The Curious Case of Overfitting Legal Transplants' in M Adams and D Heirbaut (eds) *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke* (Oxford: Hart Publishing, 2014) pp 133-146.